Reducing the risk for consumers: Submission to the Productivity Commission in response to its *Gambling: Draft Report*

23 December 2009

Elizabeth Simpson, Solicitor

Brenda Bailey, Senior Policy Officer

Level 9, 299 Elizabeth Street, Sydney NSW 2000 • DX 643 Sydney
Phone: 61 2 8898 6500 • Fax: 61 2 8898 6555 • www.piac.asn.au

1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from Industry and Investment NSW for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's work on consumer protection and gambling

PIAC's response to the Productivity Commission's *Gambling: Draft Report* (the Draft Report)[1] builds on the report made to the initial call for submissions for the current inquiry in April 2009[2] and the submission to the first Productivity Commission inquiry into this issue in 1999.[3] The recommendations in the submissions are based on the experience PIAC has gained through representing consumers with complaints about providers of gambling services.

1.3 Context

PIAC welcomes the opportunity to comment on the Draft Report. Taken as a whole, PIAC supports the recommendations in the report and believes the adoption and implementation of the recommendations could create a safer gaming environment for consumers and their families. In its initial submission on gambling for the Productivity Commission, PIAC identified unsafe practices in the delivery of gaming products and deficient laws for protecting consumers. In formulating recommendations, PIAC considered

---

1 Productivity Commission, *Gambling: Draft Report* (2009).

2 Brenda Bailey, *Ten Years On: submission to the Productivity Commission: Gambling Inquiry* (2009) Public Interest Advocacy Centre<http://www.piac.asn.au/publications/pubs/sub2009042_20090424.html>at 3 December 2009.

3 Ibid Appendix 1.

the potential harm gambling products can cause to the community and, in particular, the effect of the products on the most marginalised in our community. PIAC sought to show, in that submission, how the community can be protected from adverse effects and how those with the least capacity to seek redress can seek justice when a provider fails to deliver the product in a responsible manner.

The free market for most products allows consumers to decide what they will consume, as well as when and how much to consume. Our community accepts, however, that products with the potential to cause harm will have controls on how a product can be purchased, consumed or used. Labelling laws, age limits, licensing arrangements, health warnings and restrictions on who can provide a service are well accepted for products that pose a risk to the environment or an individual. For most products, there also exists a means of seeking redress if the provider breaches a duty of care in the manufacture or delivery of the product or service. PIAC submits that harm-minimisation measures and access to redress for the unsatisfactory provision of gambling products or services do not currently match the nature of the inherent risk of such products and services.

2. Response to Chapter 5: Counselling and treatment support services

PIAC supports the recommendations in Chapter 5 of the Draft Report that aim to increase the reach and improve the quality of problem-gambling treatment services.[4] The draft recommendation to fund prevention, research and treatment services by contributions to a central fund from all gambling providers (draft Recommendation 5.4) is strongly supported.[5] In NSW, the gambling venues that most problem gamblers patronise do not contribute to the fund that finances problem-gambling treatment services. Harm-minimisation measures and treatment services should be increased by spreading the cost across the industry.

It is disappointing that Chapter 5 does not include discussion of special-needs groups. A greater understanding of the needs of gamblers who are Aboriginal, young, or have intellectual disabilities would improve service delivery to these vulnerable groups. Recent research on the prevalence of gambling among homeless people reinforces the need to extend specialises services into areas of need such as services provided through the Supported Accommodation Assistance Program (SAAP).[6] Special-needs groups should be at the forefront of proposed recommendations about research, harm prevention, training of practitioners and diagnostic screening tools. For example, the diagnostic tool (Draft Recommendation 5.1) should also identify whether a client has an intellectual disability in order to understand whether the common forms of cognitive therapy used with problem gamblers would be effective.[7]

3. Response to Chapter 6: Gambling information and education

Information and educational material produced for schools or community campaigns should be evidence based. The research required to improve the quality of material reinforces the need for greater national co-ordination and an increase in the pool of funds to introduce harm-minimisation measures as described in draft Recommendation 5.4 of the Draft Report.[8] Equally important is how the research program is devised and who is appointed to make decisions about priorities for research funding. The draft recommendation 15.3 describing a national research body funded and managed by the Australian Government is essential in this process.[9] Research priorities should not be influenced by the special interests of the gambling industry or need of state or territory governments for taxation revenue.

In Chapter 6, the Commission raised the question as to who should control the online, mobile, phone and television-based gambling.[10] Federal legislation is responsible for telecommunications and broadcasting, and government structures are already established to monitor and police compliance of licensing of providers of these services, including in some cases, content requirements. It would seem a natural extension, and have the added benefit of national consistency if the various federal licensing bodies extended their responsibilities to control gambling content.

---

4 Productivity Commission, above n1, 5.1-5.39.
5 Ibid 5.34.
6 Australian Institute of Health and Welfare, *Problem gambling among those seeking homelessness services* (2009).
7 Productivity Commission, above n1, 5.19.
8 Ibid 5.34.
9 Ibid 15.8.
10 Ibid 6.29.

3.1 Information on player losses

PIAC supports draft Recommendation 6.3 that gaming machines be required to provide player statements.[11] An issue that arises in advising a client whether or not to pursue a complaint about a provider is whether there is evidence of gambling losses. As the Draft Report outlines, providing a receipt for the purchase of goods and services is not included in consumer protection legislation (except for Victoria), therefore there is no obligation on gambling providers to routinely provide a receipt.[12] Requiring machines to provide a player statement that lists the amount played as well as winnings would assist individuals understand their losses. Researchers could also use this information to better understand the behaviour of gamblers to improve interventions for problem gamblers.

3.2 Information in advertisements

PIAC supports draft Recommendation 6.4 that specifically bans reference to predicting future winnings by past results.[13] However, the Commission should also recommend controls for other advertising and inducements, for example:

- applying advertising restrictions across gaming types; in NSW, lotteries, keno and TAB are not subject to the same prohibitions as gaming machines;
- prohibiting advertising inside a venue;
- controlling gambling promotions through direct mail to members;
- prohibiting promotion of inducements where the patron wins bonus or reward points for playing a machine.

All advertising should be responsible, apply to all forms of gambling, and providers should be banned from providing inducements that lead or encourage patrons to gamble.

4. Response to Chapter 7: Pre-commitment strategies

PIAC is supportive of draft Recommendations 7.1 to 7.3[14] that aim to improve access to and application of self-exclusion schemes. If self-exclusion is available, it should be is easy to use, apply to all venues and work in a way that identifies excluded patrons when they attempt to enter a venue.

PIAC submits, however, that self-exclusion should not be the centrepiece of a harm-minimisation program. The focus of the Draft Report is on responsible gambling, where the emphasis remains fully on the actions of the individual controlling their gambling. This approach does not increase consumer protection. Harm-minimisation refers to the external limits on the ability of the individual to gamble excessively, and is therefore more effective for problem gamblers. Harm-minimisation measures could include changes to the configuration of gaming machines to reduce the maximum bet (therefore slowing down the amount that could be spent per hour), cashless gaming that allows credit limits to be imposed, or reducing the number of gambling venues.

Priority should be given to draft Recommendation 7.4 that places responsibility on the industry to introduce harm-minimisation measures.[15] A universal pre-commitment system as described in the recommendation

11 Ibid 6.27.
12 Ibid 6.24.
13 Ibid 6.29.
14 Ibid 7.1-7.43.
15 Ibid 7.42.

would be an important component of harm-minimisation options open to consumers. Harm-minimisation systems should apply to all types of gambling venues and types of gambling, not only gaming machines.

5. Response to Chapter 8: Venue Activities

PIAC strongly supports the conclusion in the Draft Report that complaint handling needs to be improved.[16] It is essential that the complaint process, the investigator and reviewer be independent from the licensing arm of government. Other industries provide models of complaint mechanisms, for example, the NSW Health Care Complaints Commission, the Federal Aged Care Complaint Investigation Scheme and the Energy and Water Ombudsman (EWON) in NSW. The advantage of applying a model such as EWON is that it is financed by industry. This provides an incentive to resolve issues before they reach the Ombudsman. Alternatively, a specialised branch of the NSW Office of Fair Trading would be an improvement on current protections in NSW. Incorporating a gambling industry complaint section into the Office of Fair Trading could be a first step to determining whether the frequency of complaints warrants an independent complaints body. PIAC, based on the number of enquiries it receives rejects the claim by industry[17] that legislative reforms are unnecessary because the industry is well managed.

PIAC recently submitted to several enquiries into consumer complaint systems.[18] In preparing these submissions, five characteristics of an effective complaint scheme were developed. Assessing the complaint process for gambling in NSW, it is apparent that none of the following essential principles currently apply in NSW. The characteristics are:

- that any organisation or authority that affects the rights of individuals should have clearly defined powers and be accountable;
- that there is a clear separation of the role of regulation of licensing, accreditation and standard-setting matters from the role of assessment, investigation and prosecution of disciplinary and performance matters;
- that assessment, investigation and prosecution is carried out by an independent body and employs dedicated officers to carry out these tasks in a timely manner;
- that there is no potential for perception by consumers that the system is structured so that the providers can protect themselves at the expense of protecting the public interest and individual consumers;
- that the processes to determine complaints complies with the rules of procedural fairness and is conducted in an open and transparent manner. Written reasons are provided for all decisions. Hearings are open unless there is a compelling reason for them not to be. All parties including the complainant/ notifier have a right to request a review of a decision, which is conducted at arm's length from the decision-maker.

In response to the Commission's questions[19] about penalties for breaches of mandatory harm-minimisation measures, PIAC refers the Commission to regulators of other industries. For example, fines are applied to breaches of license conditions in capital-intensive industries such as broadcasting, industries that are

---

16 Ibid 8.18.

17 At the hearing on 3 December 2010, the Commissioners, in a question to PIAC representatives, asked for a response to an industry claim that reforms to legislation were unnecessary because industry did not breach current rules and there were no complaints.

18 For example, see Peter Dodd, *Enhancing the rights-based approach to health care complaints in NSW*, (2008) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2008121_20081212.html> at 15 December 2009.

19 Productivity Commission, above n1, 8.19.

unlikely to be closed down unless the breach is extreme. The *Communications Legislation Amendment (Enforcement Powers) Act 2006* (Cth) recognises this, and includes appropriate penalties at a level that provides a deterrent.

6. Proposed statutory cause of action

6.1 Whether there should a statutory cause of action

PIAC strongly supports the Commission's recommendation that governments need to enhance gamblers' capacity to obtain judicial redress against gambling providers that behave unconscionably by introducing a statutory cause of action.

Certainty and consistency

PIAC is of the view that creating a statutory cause of action is consistent with the stated position of government that the revenue, income and profits generated by the gambling industry must be balanced against the community's interest in protecting individuals against the harm caused by excessive gambling.

Furthermore, the introduction of a statutory cause of action would provide greater certainty and uniformity by clarifying the rights and responsibilities of all of the parties. In so doing, it would not only provide consumers with better protection but would also assist gambling venues and other gambling service providers to understand the scope of their obligations, allowing them to predict whether or not their conduct would give rise to legal liability and allowing them to put in place adequate procedures to minimise the risk of a breach.

Limits of Australian common law on problem gambling

PIAC submits that the protections that currently exist to protect individuals from the harms of excessive gambling are inadequate. In particular, as PIAC highlighted in its previous submission to the Commission, there is a void in the law in respect of providing adequate protection for individuals in cases where a gambling provider has acted unconscionably or negligently.[20] In Australia, courts seem to be heavily influenced by notions of free will and autonomy and are extremely reluctant to impose any liability on a gambling provider for losses suffered by a consumer. For example, in the case of *Reynolds v Katoomba RSL Club*, the Court of Appeal found: 'save in an extraordinary case, economic loss occasioned by gambling will not be accepted to be a form of loss for which the law permits recovery'.[21]

Moreover, from a review of subsequent decisions including the *Foroughi v Star City Limited*[22] and *Kakavas v Crown Melbourne Limited*[23] cases, it appears that the bar of establishing that a case is 'exceptional' is impossibly high. Even in the case of Mr Reynolds, although the Court of Appeal acknowledged that (i) Mr Reynolds may have found it difficult or even impossible to resist gambling; (ii) the Club was aware that Mr Reynolds had a gambling problem; and (iii) Mr Reynolds had specifically asked that the Club not cash his cheques; neither the Club's knowledge of Mr Reynolds' problem, nor his request for the Club not to cash his cheques, made the Club liable. Instead the Court of Appeal found that at the end of the day there was nothing that prevented Mr Reynolds from staying away from the Club and that there were other ways in which, if the Club had not cashed his cheques, he could have still obtained the cash to gamble at the Club.

---

20 Bailey, above n 2, 25-30.

21 *Reynolds v Katoomba RSL All Services Club Ltd* [2001] NSWCA 234, per Spigelman CJ at [9].

22 *Foroughi v Star City Pty Limited* [2007] FCA 1503.

23 *Kakavas v Crown Melbourne Limited & Ors* [2009] VSC 559.

PIAC submits that the Club acted negligently towards Mr Reynolds and its behaviour should be prohibited by law. The Court, however, was not prepared to apply common law principles of negligence to achieve that outcome.

The *Kakavas* case – affirmation of the limits of judicial protection

Most recently, the Victorian Supreme Court rejected Mr Kakavas's claim of unconscionable conduct against Crown Casino. Mr Kakavas claimed that he suffered from a psychiatric condition known as 'pathological gambling'. In 1994, he had begun gambling at the Crown Casino but had subsequently been excluded, both voluntarily and by the Casino, in part because of his inability to gamble responsibly. In 2004, he was readmitted to Crown Casino to gamble and he alleged that from that date he had lost $30 million as a result of the Casino's unconscionable conduct towards him. Mr Kakavas alleged that the Casino offered him various enticements to gamble at their premises including permitting him to bet up to $3 million per hand, offering a 20 percent rebate on his losses, providing him with complimentary tickets to the Australian Open Tennis Tournament, accommodation at the Casino hotel, limousine transport in Melbourne, food and drinks, complimentary flights from Melbourne to a range of other locations and providing him with a line of credit totalling almost $4 million.

While Harper J accepted that Mr Kakavas was a pathological gambler and that the Casino must have had some knowledge of his condition[24], he concluded that the Casino had not engaged in unconscionable conduct. In reaching this conclusion, Harper J found that (i) Mr Kakavas could have resisted the inducements offered to gamble at the Casino; (ii) Mr Kakavas was able to negotiate the terms of his patronage and therefore there was relative equality of bargaining power between the parties; and (iii) there was no evidence of any conspiracy by the Casino to exploit Mr Kakavas.

PIAC submits that in reaching this conclusion, Harper J failed to properly consider whether Mr Kakavas's behaviour, rather than showing that he had equal bargaining power, was actually a symptom of his pathological gambling or 'disability'. For example, Harper J did not entertain the possibility that certain actions by Mr Kakavas, such as negotiating a higher credit limit, were not the actions of a man with equal bargaining power as the Casino, but rather manifestations of his condition. Indeed, Harper J commented:

> I accept that the inducements proffered by Crown had a part to play in the plaintiff's decision to gamble at the Crown facility…but the evidence was that by the time Crown first approached Mr Kakavas in 2004 he had already resumed gambling: this was not the case of a man who, having gambled in the past to the point where he was diagnosed as a pathological gambler, had valiantly abstained from all such activity and was …leading a life of vigilance and discipline. I am satisfied that in offering standard VIP complimentary benefits, Crown was not engaging in any nefarious activity designed to ensnare a man who had eschewed gambling. It was, rather, legitimately seeking to compete for the business of a man who was already enmeshed in the high roller world.[25]

Based on PIAC's experience of litigation in gambling cases, PIAC strongly agrees with the Commission's assessment in its draft report that:

> It is apparent that the courts will generally not find in favour of a problem gambler suing a venue for negligence, breach of statutory duty or unconscionable conduct, other than in a prescribed and narrow set of circumstances. Moreover, given the expense and time involved in litigation, very few gamblers will be in a position to take action against gambling venues in the first place.[26]

---

24 Ibid per Harper J at [1].

25 Ibid [592].

26 Productivity Commission, above n 1, 8.23.

Vulnerable consumers

The lack of adequate protection for consumers is particularly serious when one bears in mind that there are a number of groups that are particularly likely to become problem gamblers including Indigenous Australians, young people, people with intellectual or physical disability and low-income earners. As PIAC set out in its previous submission, the rates of problem gambling among these groups is high and particularly concerning given their vulnerability.[27] In those circumstances, it is all the more important that there be adequate protection and redress for problem gamblers.

For example, in 2008, a man, who we shall refer to as 'John', approached PIAC. John has severe schizophrenia and obsessive-compulsive disorder, which means he is unable to gamble responsibly. However, in 2005 he began regularly attending Star City Casino and gambling. In 2006, he lost $3,000 in one session at the Casino and became very distressed. Subsequently, John's doctor wrote a letter on his behalf to the Casino, explaining John's mental health issues and requesting that the Casino ban him. The Casino responded by issuing a non-voluntary exclusion order against John, which arguably meant the Casino was aware of John's inability to gamble responsibly and voluntarily.

However, John continued to visit Star City Casino on a regular basis. He was never denied entry, asked for identification, nor prevented from gambling. On several occasions John asked staff members to refuse him future entry, but he continued to be able to visit the Casino.

John estimated that he has lost over $40,000 since the exclusion order was issued. This amount may not seem significant but John lives on a Disability Support Pension and has lost all of his savings as a result of gambling at the Casino.

Unfortunately, John had no recourse to legal action as it would be difficult for him prove his losses and establish a breach of the Casino's duty of care. This left John in an extremely vulnerable position as it is clear that he cannot gamble responsibly and the current self-exclusion measures introduced by the NSW Government do not operate effectively for people who, because of mental illness or other conditions beyond their control, may gamble excessively.

Furthermore, while the Commission in its Draft Report suggested that 'as more and more cases come before the courts, the potential circumstances that gamblers are able to seek redress will be clarified and this in turn will create specific incentives for venues to respond appropriately', PIAC is less optimistic.

PIAC is of the view that that Australian courts appear to have failed to fully grasp the nature and consequences of problem gambling. In comparison to other addictions, even while acknowledging that a consumer suffers from problem gambling Australian courts continue to insist that ultimately consumers can restrain themselves from gambling and therefore there is no liability on the part of the service provider. This may in part be based on the lack of comprehensive research about the effects and consequences of problem gambling. However, until such time as significant studies are undertaken and more is understood in the community about the psychological effects of problem gambling, it seems to PIAC extremely unlikely that the fundamental assumptions underpinning these judicial decisions will be reversed.

Furthermore, in light of the recent cases that reject any duty of care for alcohol-suppliers (see 6.2 below), PIAC agrees with the conclusion of a number of commentators that these cases form part of a broader

[27] Bailey, above n 2, 12-16.

trend of rolling back the law of negligence in Australia and it is therefore even less likely that an Australian court will reverse this trend in the future in relation to problem gambling cases.[28]

Therefore, PIAC submits that the most pragmatic and sensible way of redressing the balance between the commercial interests of gambling providers and the harm to communities and individuals of excessive gambling is for Australian legislatures to introduce statutory causes of action.

6.2 Comparison with alcohol-server liability

Australian position

While legislation in some Australian states and territories imposes duties on alcohol providers not to serve intoxicated persons or to exclude intoxicated persons from premises, the legislation is generally very limited and does not create a duty on the part of the server towards intoxicated patrons.

This reluctance to impose a duty of care on alcohol-servers is reflected in Australian case law. For example, in the case of *Cole v South Tweed Heads Rugby Club*[29], the majority of the High Court found that the Club was not liable to Mrs Cole for injuries she suffered from a car accident near the Club shortly after leaving the Club after spending most of the day drinking there and becoming highly intoxicated.

In rejecting the appellant's submission that the Club had breached its duty of care towards her, both Gleeson CJ and Callinan J emphasised the practical difficulties in imposing such a duty on a club, restaurant or other alcohol provider such as monitoring individual's consumption of alcohol and judging when someone has reached a high level of intoxication.[30] Another important factor for both judges was the notion of individual responsibility and choice.[31]

On the other hand, both Kirby and McHugh JJ concluded that the provider owed a duty of care towards intoxicated patrons. McHugh J reached this conclusion by extending the common law principle of occupier liability to alcohol-suppliers. He concluded that the Club had an affirmative duty to Mrs Cole to take steps to prevent her drinking.[32] In relation to the practical difficulties associated with the purported duty of care, McHugh J took the view that difficulties in determining levels of intoxication may affect the reasonableness of a respondent's conduct but did not negate the existence of the duty.

While Kirby J agreed with McHugh's comments that the common law has, for a long time, recognised occupier's liability, the central issue for Kirby J was that the Club had a commercial interest to supply alcohol to its members and their guests, including the appellant, and therefore should bear some of the responsibility for injuries suffered as a result of the appellant's intoxication. Instead of concentrating on personal autonomy and responsibility, he focused on the vulnerability that excessive alcohol consumption can cause individuals, and the control and consequent responsibility that a commercial provider of alcohol has to the people to whom it supplies alcohol.[33] In reaching this conclusion, Kirby J offered a critique of the

---

28 Rosalind Dixon and Jason Spinak, Case Note - Common Law Liability of Clubs for Injury to Intoxicated Patrons: Cole v South Tweed Heads Rugby League Football Club Ltd, (2004) 27 (3) *University of NSW Law Journal* 816. See also Penelope Watson, 'You're not drunk if you can lie on the floor without holding on' – Alcohol Server Liability, Duty, Responsibility and the Law of Torts (2004) *James Cook University Law Review* 108.

29 *Cole v South Tweed Heads Rugby Club* [2004] HCA 29.

30 *Cole v South Tweed Heads Rugby Club* [2004] HCA 29, per Gleeson CJ [10]- [11], per Callinan J [130], and per Gummow and Hayne JJ [66]-[70].

31 Ibid, per Gleeson CJ, [13], [18] and per Callinan J [121].

32 Ibid, per McHugh J [[40].

33 Ibid, per Kirby J [84]-[86].

majority decision that PIAC believes could apply equally to the reasoning about gambling venues' liability. Kirby J said:

> Their [Gleeson CJ and Callinan J] Honours' reasons are, with respect, replete with expressions reflecting notions of free will, individual choice and responsibility … Whatever difficulties free-will assumptions pose for the law in normal circumstances, such assumptions are dubious, need modification and may ultimately be invalidated having regard to the particular product which the Club sold or supplied to patrons such as the appellant, namely alcoholic drinks. The effect of that product can be to impair, and eventually destroy, any such free will. This fact imposes clear responsibilities upon those who sell or supply the product in circumstances like the present…[34]

However, the High Court in its decision earlier this year in *CAL No 14 Pty Ltd v Motor Accidents Insurance Board & Scott* (the *Scott* case) decisively rejected any suggestion that an alcohol server owed a duty of care to an intoxicated patron.[35] In the *Scott* case, the patron had suffered fatal injuries after riding his motorcycle home from the hotel while intoxicated.

The High Court held that proprietors and licensees owe no general duty of care to customers requiring them to monitor or minimise the service of alcohol or to protect customers from the consequences of alcohol.[36] In particular, the High Court rejected the argument that the manager of the hotel had breached his alleged duty of care by failing to call the patron's wife to come and collect him and/or failing to prevent him leaving the pub and driving home. Again, the focus of the High Court's attention was on Mr Scott's autonomy and the fact that as a mature adult he could not be characterised as vulnerable. The High Court left open, however, the possibility that a duty may be owed in 'exceptional cases'.[37]

American and Canadian positions

It is worth referring to the position in the USA and Canada, where both the courts and legislature have taken a markedly different approach to the question of whether an alcohol server owes a duty of care towards intoxicated patrons.

For example, most American states have 'dram shop laws', which imposes stringent controls on alcohol service and consumption, in particular making alcohol servers responsible for the harm caused as a result of serving intoxicated or underage patrons, although the details vary between states.[38]

Similarly, in Canada, the general view is that alcohol servers should be at least partially liable for reasonably foreseeable injuries to patrons who are intoxicated. For example, in the leading case of *Jordan House Limited v Menow & Honsberger,*[39] the Canadian Supreme Court recognised that the a hotel owner owed a duty of care towards an intoxicated patron were the patron was injured in a car accident about thirty minutes after he left the hotel, and the Court apportioned equal liability to Mr Menow, the hotel and the driver who hit Mr Menow.

---

34 Ibid, per Kirby J [90].

35 *CAL No 14 Pty Ltd v Motor Accidents Insurance Board & Scott* 2009] HCA 47, 10 November 2009.

36 Ibid, per Gummow, Heydon and Crennan JJ [31]-[45].

37 Ibid, per Gummow, Heydon and Crennan JJ [44].

38 Watson, above n 28.

39 (1973) 38 DLR (3d) 105; see also *Hague v Billings* (1989) 68 OR (2d) 321; and *Crocker v Sundance Northwest Resorts Ltd* (1988) 51 DLR (4th) 321.

Interestingly, studies from USA suggest that there is a strong correlation between dram shop legislation and improvements to responsible practices within the liquor industry.[40]

6.3 Alternatives to a statutory cause of action

Another way of responding to the question of whether there should be a statutory cause of action is to assess the alternatives to this proposal.

No change

In its previous submission[41], PIAC noted that there were two distinct and separate policies that governments adopt to provide protection from excessive gambling, namely 'responsible gambling' and 'harm-minimisation'. The former refers to measures that are taken by both patrons and venues that are intended to encourage the patron to limit his or her gambling such as clocks on screens and making counselling and education services available to patrons. These controls require the gambler to take responsibility, to abstain or to stop gambling. The latter refers to external limits on the ability of individuals to gamble excessively, such as reducing the amount that can be spent in an hour or requiring pre-commitment of the amount the gambler intends to spend.

PIAC contended that adopting 'responsible gambling' strategies rather than 'harm-minimisation' strategies was problematic as it ultimately provides very limited protection for consumers and is less likely to encourage significant changes in the behaviour of gambling service providers.[42] Moreover, PIAC submitted that some of the 'harm-minimisation' measures adopted in NSW, particularly self-exclusion schemes, are not as effective as is sometimes suggested by the industry.[43] For example, if one recalls the case study of 'John' and the other cases referred to in the Draft Report, none of these strategies appear to be very effective in protecting problem gamblers. In any event, this 'alternative' does not provide consumers with adequate redress or compensation for the reasons set out above in response to the question of whether there should be a statutory cause of action.

Thus, PIAC disagrees with the suggestion that the existing regulatory structure provides adequate protection for consumers.

Increasing penalties within the existing regime

PIAC supports the proposal that the fines/penalties that can be imposed on gambling providers that fail to comply with harm-minimisation strategies should be increased and made subject to a more rigorous, open and accountable regime.

However, not only should consideration be given to increasing penalties, but the regime should also be rationalised so that the penalty reflects the seriousness of the offence. For example, PIAC notes that the *Casino Control Act 1992* (NSW) prohibits a person who is subject to a non-voluntary exclusion order from entering or remaining in a Casino and allows for the authority to impose a fine of up to 50 penalty units ($5 500) or 12-months' imprisonment or both if an excluded person breaches this provision.[44] In contrast, if a Casino agent or employee becomes aware that someone is prohibited from entering or remaining in a Casino and fails to notify the inspector and then remove the excluded person, the maximum penalty for the

---

40 See, for eg, CS Ireland, Alcohol and Its Contribution to Violence: New Directions for Policing Alcohol-Related Violence, Crime and Anti-Social Behaviour in NSW, in D Chappell and SJ Egger (eds), *Australian Violence: Contemporary Perspectives II* (1995) 174, quoted in P Watson, above n 28.

41 Bailey, above n 2, 17-23.

42 Ibid, 21-22.

43 Ibid, 23.

44 *Casino Control Act 1992* (NSW) s 84(1)

Casino is 20 penalty units ($2,200).[45] Furthermore, a Casino incurs the same penalty for failing to prepare a daily list of excluded persons for Casino inspectors (20 penalty units) as it does for failure to remove an excluded person, and a greater penalty (50 units) if it fails to inform the Casino Authority of an exclusion order that has been revoked. In PIAC's submission, the penalty for a failure to enforce an exclusion order should carry greater weight than a failure to comply with an administrative requirement. More importantly, penalties for Casinos should be greater than for excluded persons.

Similarly, under the *Gambling Machines Act 2001*(NSW) while a hotel or club is required to create and advertise self-exclusion schemes and the failure to establish a system carries a penalty of 100 penalty units ($11 000) [46], it is expressly stated that no civil or criminal penalty will apply to a responsible person if she or he acts in good faith and a patron still enters or remains in a gambling-machine area in breach of a self-exclusion order.[47] In PIAC's view, this sub-section undermines any incentive on a responsible person to implement systems to enforce and monitor its self-exclusion schemes, rendering their effectiveness illusory. As a minimum, provisions like this should be deleted.

PIAC approaches the question of whether increasing penalties is a better proposal than introducing a statutory cause of action by considering the objectives of each proposal. The proposal to increase penalties is aimed as enforcing compliance with government regulations, whereas the proposal to introduce a statutory cause of action is designed to provide compensation for vulnerable consumers and problem gamblers when a provider acts egregiously towards the consumer. Thus, PIAC submits that the proposal to increase penalties and the proposal to introduce a statutory cause of action are not mutually exclusive. Instead, PIAC contends that the two proposals would support one another and recommends that consideration be given to implementing both.

Allowing a regulator to pass on some of the 'fine' to the complainant

At the hearing in Sydney on 2 December 2009, PIAC was asked whether, when a regulator imposes a fine, he/she could pass on this fine, or part of this fine, on an ad hoc basis to a complainant as an alternative to creating a statutory cause of action. When a regulator such as a Casino authority imposes a fine on a gambling-service provider, the money that is paid into government consolidated revenue. As such, it would not be possible for the regulator to 'pass' on some of the fine to a consumer on an ad hoc basis.

However, it would be possible to set up a scheme akin to a victim's compensation scheme, to provide compensation to victims of gambling-service providers that have committed certain offences. Unlike a fine, the focus of such a scheme would be on restitution that is, helping the consumer to get back on his or her feet by putting them in the position they would have been in but for the provider's unconscionable conduct.

For example, in NSW victims of crime are eligible to apply for statutory compensation depending on the injuries that they have suffered. An application for compensation is assessed according to the criteria set out in the *Victims Support and Rehabilitation Act 1996* (NSW) (the VSR Act) and is determined by a compensation assessor.[48] If an applicant is unhappy with the assessor's decision then they can appeal to the Victims Compensation Tribunal[49] and then to the District Court on points of law.[50] All payments to eligible applicants are made out of the Victims Compensation Fund Corporation, which is created pursuant

45 Ibid, s 85(2)
46 *Gambling Machines Act 2001*(NSW) s 49(3).
47 Ibid, s 49(5).
48 *Victims Support and Rehabilitation Act 1996* (NSW) s 29 and 30.
49 *Victims Support and Rehabilitation Act 1996* (NSW) s 36.
50 *Victims Support and Rehabilitation Act 1996* (NSW) s 39.

to the VSR Act[51] and is owned and operated by the Compensation Fund Corporation, which is also established under the VSR Act.[52] The Victims Compensation Fund is comprised of monies provided to the Fund by the NSW Treasury, from proceeds of crime and other monies recovered under the *Criminal Assets Recovery Act 1990* (NSW).[53]

Establishing a gambling compensation scheme would involve the creation of a trust fund or scheme under legislation. The legislation would need to deal with issues such as who could apply to the fund for compensation, and in what circumstances as well as levels of appropriate compensation.

There are pros and cons to each proposal. The advantage of establishing a compensation scheme is that the primary responsibility for prosecuting gambling-service providers rests with the regulator rather than being placed on vulnerable consumers. Furthermore, applying under a compensation scheme would not leave individuals exposed to the risk of an adverse costs order, unlike bringing proceedings pursuant to a statutory cause of action.

However, the efficacy of a compensation scheme is less predictable and more risky as it not only involves enacting legislation to create the scheme, but depends on the effectiveness of the regulator in ensuring compliance with the scheme. At the moment in NSW, PIAC does not believe that any of the bodies that regulate gambling have enough independence or sufficient resources to effectively operate such a scheme.

On balance, PIAC's preference is for creating a proposed statutory cause of action as the option more likely to provide consumers with adequate redress.

However, if the Commission is minded to recommend the creation of a compensation scheme akin to victim's compensation over a statutory cause of action, PIAC submits that the comments below about the elements of the proposed cause of action could apply equally to a gambling compensation scheme.

6.4 What criteria should be used to define the statutory cause of action?

There are a number of proposals in Australia that could be drawn on as a useful precedent for creating a statutory cause of action in respect of problem gambling, in particular the Australian Law Reform Commission[54] and the NSW Law Reform Commission's[55] proposals to introduce a statutory cause of action for breach of privacy.

Essential elements of the proposed cause of action

In PIAC's view, there should be two aspects to a statutory cause of action, namely (i) that the gambling provider had reasonable knowledge that an individual had a vulnerability and, in the circumstances, (ii) the act or omission of the gambling provider was 'egregious'.

PIAC submits that the proposed statutory cause of action should primarily focus on the actions of the gambling provider. However, if the act or omission complained of is simply unethical or non-compliant, but does not amount to 'egregious' behaviour, then these acts should be dealt with under a separate

---

51 *Victims Support and Rehabilitation Act 1996* (NSW) s 67.

52 Ibid.

53 *Victims Support and Rehabilitation Act 1996* (NSW) s 68.

54 Australian Law Reform Commission, For Your Information: Australian Privacy Law and Practice, *Report 108* (2008) Chapter 74 <http://www.austlii.edu.au/au/other/alrc/publications/reports/108/74.html> at 16 December 2009.

55 New South Wales Law Reform Commission, Invasion of Privacy, *Consultation Paper 1* (2007). <http://lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cp01toc> at 16 December 2009.

regulatory regime that imposes fines or other penalties. The proposed statutory cause of action should only arise in relation to those cases where the consumer is vulnerable and the provider, aware of this vulnerability, acts 'egregiously'. The distinction is that in the latter cases, the 'harm' or mischief that the compensation regime is responding to is not just a breach of a compliance regime but involves the provider acting unconscionably or negligently towards a vulnerable consumer.

Reasonable knowledge of the consumer's vulnerability

PIAC is of the view that the threshold test for the proposed cause of action should be whether the provider had reasonable knowledge or awareness that a consumer was vulnerable to problem gambling. PIAC submits that it is this factor that gives rise to a duty towards a particular individual, which, once breached by the provider, means that there should be an obligation for the provider to compensate the individual for his or her losses.

In talking about 'vulnerability', PIAC strongly submits that this should include individuals who suffer from 'problem gambling'. However, PIAC is of the view that the threshold test should not be limited to problem gamblers, as there may be other reasons why a particular individual is vulnerable. For example, in the case of 'John' his vulnerability largely stemmed from mental illnesses not related to problem gambling but which meant that he was unable to understand the consequences and risks of gambling and furthermore was unable to control his desire to gamble, leaving him vulnerable to problem gambling. On the other hand, PIAC maintains that there must be a nexus between the 'vulnerability' and problem gambling. Otherwise, there is a risk that a provider would effectively be required by this provision to discriminate against people with a mental illness or disability.

Furthermore, PIAC acknowledges the importance of properly framing the proposed cause of action to avoid the situation where the compensation provisions would allow a non-problem gambler, to subvert this to try to get back the money lost gambling. Thus, PIAC submits that it would not be sufficient for an individual to show that he or she has a 'vulnerability', but would also have to establish that the provider was aware or should have been aware of this vulnerability. For example, in most cases it will be necessary to show that the individual contacted the provider and provided independent documentation, such as a psychologist report, before the first element of the proposed cause of action will be satisfied. On the other hand, there may be cases such as the *Kakavas* case where, because of its prior dealing with the provider, the provider will have to show that it would have been reasonably aware of the individual's vulnerability and should have taken steps such as requiring a patron to obtain a psychologist's report before readmitting them to the Casino.

What is reasonable will depend on the circumstances of the case. Legislation could, however, list factors for a court/tribunal to consider in assessing reasonableness. For example, relevant factors may include the relationship and prior dealings between the parties, the nature and symptoms of an individual's condition, disability or vulnerability.

Acts or omissions that constitute egregious behaviour

In addition to establishing that the provider knew, or should have known about the consumer's vulnerability, a litigant should also have to show that the provider acted 'egregiously' before he or she should be able to obtain compensation under the proposed statutory cause of action. PIAC submits that the following examples should form part of a non-exhaustive list of the acts or omissions that should be considered 'egregious':

- permitting a highly intoxicated person to gamble in a casino;
- cashing cheques for a patron, or extending credit facilities to a patron if the patron and/or his or her family have specifically requested that the provider not provide credit or cash cheques;

- failure to advise a patron that in light of his vulnerability to problem gambling that he/she should resign membership from the club, hotel or other provider;
- offering inducements including the provision of cheque-cashing facilities or Automatic Teller Machines that allow patrons to make withdrawals from credit accounts, supplying complimentary products such as free food alcohol, transport or accommodation, giving gamblers complimentary tickets to sporting or other events, and providing exorbitant maximum bet or credit limits;
- serving alcohol to vulnerable patrons who are already heavily intoxicated;
- failure to implement adequate systems that enable the detection of consumers who are subject to exclusion orders or bans;
- failure to implement adequate systems or provide staff with adequate training about removing excluded persons who have entered a gambling venue or are using gambling services.

Reckless and negligent, as well as intentional acts

The proposed statutory cause of action should not be limited to intentional acts, but should extend to reckless and negligence acts.

There is no doubt that a person or entity that deliberately or wilfully engages in egregious behaviour towards problem gamblers should be liable. However, limiting liability to intentional acts would narrow the scope of the cause of action unacceptably.

PIAC therefore strongly submits that liability should at least also extend to reckless acts, for example, where a gambling venue deliberately ignores a risk of harmful consequences arising from an action or fails to give any thought to such a risk. For example, in the *Kakavas* case, while the court rejected his claim that the Casino had acted unconscionably, it accepted that as a result of its prior dealings with Mr Kakavas, the Casino acted recklessly in re-admitting him to its premises without properly investigating whether the Casino's suspicions about his gambling were justified. PIAC submits that this kind of behaviour should be sufficient to meet the 'egregious' behaviour.

Additionally, consideration should be given to extending the cause of action to negligent acts. Negligent acts can, in some cases, have extremely serious ramifications for vulnerable gamblers, which can be just as serious as those cases where a provider deliberately or carelessly exploits or otherwise behaves in an egregious manner towards a consumer.

Furthermore, many systemic breaches by gambling venues and service providers are due to negligence, rather than intentional acts, for example inadequate screening procedures to ensure that excluded persons are not allowed to re-enter a venue once an exclusion order is in place. Restricting liability to intentional acts could discourage organisations from taking steps to ensure that their harm-minimisation strategies are adequate and may encourage indifference to the issue.

Respondents

In relation to the question of the types of gambling providers that should be caught by the cause of action, PIAC submits that any statutory cause of action should apply to all gambling providers and not just venue-based providers. This would allow such an action to have sufficient flexibility to apply to new forms of gambling, particularly as technological developments lead to increases in the amount of online gambling.

Remedies

PIAC submits that the remedies for the proposed statutory cause of action should include different types of damages such as general, special and aggravated damages if a consumer can establish to a court/tribunal's satisfaction that they should be entitled to receive general damages for economic loss suffered as a result of

the egregious behaviour. On the other hand, if a litigant cannot establish economic loss, it should still be open for a court/tribunal to award damages for non-economic loss, such as distress or psychological injury.

In addition to the power to award damages under the proposed cause of action, a tribunal or court should be able to order non-monetary remedies such as ordering a respondent to develop and implement a program or policy aimed at eliminating the non-compliant behaviour in the future. PIAC notes that there is precedent for such a power, see for example section 108(2)(e) of the *Anti-Discrimination Act 1977* (NSW) provides that in respect of a vilification complaint, the Administrative Decisions Tribunal may order the respondent to develop and implement a program or policy aimed at eliminating unlawful discrimination.

Procedure

Consideration also needs to be given to the procedure or mechanism by which a person institutes proceedings for a breach of the proposed cause of action.

In PIAC's view, it would be preferable if a tribunal were able to hear proceedings under the proposed cause of action, subject to a right of appeal to a court on a question of law. The advantage of this proposal is that it overcomes some of the other difficulties that litigants face in bringing proceedings, such as the risk of adverse costs orders, and the delays involved in litigation in the court system. Vesting jurisdiction in a tribunal would mean that proceedings would be heard by a decision-maker with a high level of independence, public confidence and experience dealing with issues of statutory interpretation and damages, and allow for the accumulation of expertise in this new statutory cause of action by tribunal members.

In relation to the question of which tribunal should be given the power to hear the proposed cause of action, PIAC submits that, at least in the case of NSW, the most appropriate tribunal is the Administrative Decisions Tribunal, in light of its experience adjudicating issues such as 'reasonableness' and whether a person has a disability.

Finally, whichever tribunal is given jurisdiction in respect of the proposed cause of action, the rule should be that each party bears their own legal costs, regardless of who wins.

7. Response to Chapter 9: Access to cash and credit

PIAC supports draft recommendations 9.1 – 9.4 regarding restricting access to cash at gambling venues.[56] It is clear from the summary of research in the Draft Report[57] that access to cash at venues assists problem gambler's to continue to gamble. Even the NSW Government reported a link between access to cash and problem gambling[58], although its submission did not go on to support restrictions. In opposition to this research, the NSW Government supported the gambling industry by agreeing to its request[59] to reduce protections for problem gamblers. The NSW Government doubled the amount of prize money that could be paid in cash rather than cheque, and repealed the *Registered Clubs Act 1976 (NSW)* that prohibited payment of cash advances.

Restricting access to cash is an important harm-minimisation measure. To enable implementation, it will be necessary to separate the government policy making function from regulatory and enforcement functions,

56 Productivity Commission, above n 1, 9.1-9.44.
57 Ibid 9.8.
58 Ibid
59 Clubs NSW, *Annual Report 2008* (2008) 8.

and establish an independent gambling authority with the primary objective of furthering the public interest and consumer protection.

8. Response to Chapter 10: accessibility of gaming machines

PIAC supports draft recommendation 10.1 to reduce the hours of operation of venues.[60] Closing times or 'shut-down periods' for venues should be mandatory and applied to all venues in NSW. Venues should not have an option to request an exemption from the shutdown period. The current shut-down arrangements in NSW venues were amended to reduce the shutdown period from six hours to three following complaints from industry about loss of gaming revenue.[61] Evidence of harm-minimisation working is that gamblers are spending less; therefore the loss of revenue was evidence that the harm-minimisation measure was working. So long as governments are sensitive to the loss of revenue from gaming taxes, it will be difficult to implement such measures.

It is disappointing that the evidence described in the Draft Report[62] about the link between accessibility to gaming machines and gambling harms did not result in a recommendation about caps in numbers of machines available in the community. Since the publication of the Draft Report, news reports[63] have been published describing new research linking the number of gaming machines in a geographic area to the prevalence of problem gambling. PIAC suggests that the Commission reconsider the recommendations in Chapter 10 of the Draft Report in light of this new research.

It is of concern that the NSW Government could use the Commission's comments to abandon its already liberal approach to the calculating the number of machines allowed in a local government area to lifting all restrictions on the number of machines without consultation with the community concerned. At a minimum, governments should require the gambling providers to apply for approval and undertake a Local Impact Assessment and community consultation when applying for new licenses, purchasing licences or moving machines from one venue to another (regardless of whether it is within the same local government area). This should be required when machine numbers are increased or machines moved to another venue, whether owned and operated by the same or new provider, or in the case of NSW, an amusement device (non-gaming machine) is replaced by a gaming machine.

9. Response to Chapter 11: Game features and machine design

PIAC supports changes to gaming machines that prevent excessive loss of money as a strategy to reduce, minimise or eliminate harm.[64] The longer a gambler plays a machine the greater the loss of money, so reducing the pace at which money can be lost will reduce harm. Modifying machines to reduce the amount

---

60 Productivity Commission, above n3, 10.15.

61 NSW Parliament, Gaming Machines Amendment (Shutdown Periods) Bill, Second Reading, *Hansard Articles* : LC (24/06/2003): #81 <http://www.parliament.nsw.gov.au/prod/PARLMENT/nswbills.nsf/1d4800a7a88cc2abca256e9800121f01/76a6c455901a2783ca256d1e0023c7ab/$FILE/C1603.pdf> at 14 December 2009.

62 Productivity Commission, above n 1, 10.3.

63 Lisa Carty, 'People v profits in war of the pokies', *Sun-Herald* (Sydney) 13 December 2010, 7.

64 Productivity Commission, above 1, 11.1-11.48.

of a single bet or amount played per hour should be introduced along with other measures recommended in the Draft Report such as mandatory shut-downs[65] for a period each day.

10. Response to Chapter 12: Online gaming and the Interactive Gambling Act

PIAC notes that the draft recommendation to lift the prohibition on online gambling in Australia is based on evidence that Australian residents are gambling through international Internet sites that have no controls or harm-minimisation measures.[66] There is also inconsistency in laws that permit online betting on sports and allow Australian companies to operate online gambling services to non-Australian residents but not to local residents.

It is not difficult to imagine a scenario where lifting of the prohibition on online gambling would create the potential for every computer terminal in homes, schools, businesses and cafés to become an electronic gaming machine. If current gaming providers are allowed to operate online businesses there is potential for them to bypass current rules about electronic gaming by replacing machines with computer monitors. It would also be possible to provide wireless connections so that people could take their own laptops and continue to gamble in every part of the venue and so avoid the harm-minimisation measures and make self-exclusion from gaming areas impossible to enforce. With this worst case scenario in mind and the recent research referred to above (comment on Chapter 10) linking access to gaming machines with problem gamblers, regulations would need to be put in place to control ownership, advertising and enforce harm-minimisation measures. Safeguards should include:

- a requirement to limit the amount of a single bet;
- a prohibition on gambling using money on credit;
- time limits for each gambling session with enforced exclusion from sites for periods between gambling sessions;
- a mandatory registration process to verify a gamblers age and identity;
- pop-up messages about amount spent and time period spent gambling;
- licensing rules on who can hold a license to own and operate an online gambling site, similar to the ownership rules for casinos;
- rules to ensure competition and avoid concentration of ownership of gambling services; companies and their subsidiaries that own or operate gambling venues, as well as not-for-profit clubs should be restricted from controlling a dominant share of the market;
- the establishment of a national body that has responsibility for monitoring and enforcing rules as well as investigating complaints;
- financial penalties and restrictions on trade of gambling products and services at all venues owned or operated by an operator found to be in breach of license conditions or harm-minimization requirements;
- taxation of revenue regardless of who owns and operates the site, so clubs become subject to the same rules as other gambling providers. A percentage of taxation should contribute to research, consumer consultation, education, community announcements and treatment services for problem gamblers;
- a process whereby a gambler can self-exclude from all online gambling by making a single application for exclusion;

65 Ibid Recommendations 10.1, 10.24.

66 Ibid 12.29.

- all online gambling services should provide data to the regulator of details on revenue, number of gamblers, use of harm-minimization measures and complaints;
- advertising and sponsorship should be restricted from events, venues and media that are directed or popular with children, similar to current practices for alcohol advertising;
- laws that apply to the operation and advertising of electronic gaming machines should also apply to online gaming.

11. Response to Chapter 13: Development in the racing and wagering industries

PIAC has not considered the operation of racing and wagering industries as examined in this Chapter.[67] However, in considering harm-minimisation measures for problem gamblers, particularly gamblers from marginalised communities, PIAC recommends that all gaming industries, including racing and wagering should be subject to:

- the same advertising restrictions as hotels and clubs;
- self-exclusion schemes availability at betting outlets, including online services;
- mandatory contributions to an independent fund that provides grants for research, consumer consultation, education, community announcements and treatment services for problem gamblers.

12. Response to Chapter 14: Regulatory processes and institutions

PIAC strongly supports the draft recommendations 14.1–14.6 that refer to the institutional structures of government to develop policy, regulate and monitor the industry.[68] The implementation of these recommendations is fundamental to any successful reform of the gambling industry that will generate a safer environment for problem gamblers, their families and the general community. It will be a major shift for state governments to focus on the public interest rather than revenue and not be persuaded by the narrow interests of the club and gaming industry. The recommendations in this chapter that support an independent regulator, provide for a consumer protection charter, improve transparency of regulatory processes and access to information are essential if the safety of this product is to be improved.

The recommendations are also fundamental and complement the draft recommendations on legislative reform in Chapter eight of the Draft Report. In its initial submission, PIAC commented on the need for reform to balance the interests of the gaming industry and consumers. PIAC is concerned about the influence can have on a government dependent on revenue generated as the result of the industry and how this could outweigh decision-making in the public interest. For example, the initial PIAC submission quoted a long list of concessions Clubs NSW claimed to have achieved from the NSW Government, none of which were beneficial to the community or problem gamblers. The quote from 2006, also referred to the Clubs NSW Chief Executive Officer as prepared to 'stand and fight' for further tax concessions. It would appear from recent news reports, the gaming industry intends to use its influence at the next NSW state election and has launched its campaign to argue for reduction in taxes, regardless of the benefits to the community.[69]

---

67 Ibid 13.1-13.46.

68 Ibid 14.1-14.25.

69 Carty, above n 62

12.1 Improving community consultation

The Draft Report describes the improvements necessary in the regulatory processes and the need to facilitate input from 'less well-organised groups such as consumers and local communities' to ensure they are not 'marginalised by more powerful players'.[70]

PIAC appeared at the Productivity Commission Sydney hearing on 2 December 2009, at which the Commissioners discussed how consumers could be supported to contribute to public consultations and how this could be funded. PIAC supports public funding of an independent, community-based, specialised entity to represent and support consumer interests. As an example of a model on which such an entity could be based, PIAC provides a case study of its Energy + Water Consumers' Advocacy Program (EWCAP) at Appendix 1.[71]

Gambling research and legislation is similar to the utility sector in that it is complex, changing as new technology or research is available and pressures are placed on the community outside of its control. In this environment it is difficult for a voluntary group to access the necessary expertise to analyse and manage the volume of information as it comes to hand and develop the skills to influence government and political processes. A specialist entity that is independent of government, industry and problem-gambling treatment services, that can interpret information, make submissions and negotiate from a public interest perspective can assist government and industry to review and modify legislation and practices to avoid further harm to disadvantaged communities. Such an entity could be effective either at a national or state level, if appropriately resourced. The entity could sit within an organisation such as one of the Councils of Social Service.

It is difficult for organisations such as PIAC to be involved in areas such as gambling when there is not a body of knowledge from a consumer perspective that can be drawn upon. PIAC was fortunate that funds were available to engage a consultant with knowledge of problem gambling studies to assist with the initial submission. There were no community-based advocacy services that could provide the level of expertise required to develop the submission. A small community organisation, such as PIAC, would usually find it very difficult to purchase such advice. A centrally funded consumer body would add value to the work of consumer organisations.
In PIAC's view, industry should fund this entity. However, current funding to treatment services and research should not be reduced in order to fund consumer policy and research advisors. The implementation of draft recommendation 5.4 would be necessary to increase the funding available for community representation.[72]

13. Response to Chapter 15: Gambling policy, research and evaluation

PIAC supports the draft recommendations in Chapter 15 for an independent national research body that focuses on harm-minimisation.[73] However, PIAC notes in Draft Recommendation 15.3 that the proposed

---

70 Productivity Commission, above 1, 14.13-14.14.

71 Energy + Water Consumers' Advocacy Program (EWCAP), provides an independent voice for low-income and other residential consumers in the implementation of full retail competition in the NSW energy market and the national electricity market. It contributes a consumer perspective to government committees; conducts research; liaises with other consumer, community and environmental groups; and publicises relevant issues in the media.

71 Productivity Commission, above 1, 5.34.

body would include an advisory panel of 'community, industry and other experts'.[74] Industry and state and territory governments should be consulted but they should not be part of the decision-making process. Industry representatives should not be part of licensing boards, advisory panels, or other bodies influencing decision-making. Governments with a reliance on taxation of gambling revenue and industry have a fundamental conflict of interest and their influence greatly outweighs any that consumers can have on such bodies. A body with independent decision makers with a public and transparent process is required.

14. Response to Chapter 16: Transitions

PIAC supports the proposal that harm-minimisation measures should be a high priority for governments and welcome the highlighted list of 'low cost' reforms that governments could implement.[75] PIAC would add to this list the introductory of legislative reform as proposed at draft recommendation 8.2[76], and the funding and establishment of a consumer advocacy program. As reforms are ongoing, the need for input from consumers is immediate and essential if reforms are to be informed by all stakeholder groups.

15. Senate Community Affairs Legislation Committee

In November 2009, the Senate referred the Poker Machine (Reduced Losses-Interim Measures) Bill 2009 (Cth), introduced by Senator Xenophon, and the Protecting Problem Gamblers Bill 2009 (Cth), introduced by Senator Fielding, to the Community Affairs Legislation Committee. The Committee requested that comments on these Bills be made as part of the Productivity Commission's process.[77]

PIAC has reviewed the Bills and found the objectives of the Bills are consistent with the PIAC submission that emphasis should be placed on harm-minimisation measures that limit the ability of the individual to gamble excessively. Changes to the configuration of gaming machines that these Bills aim to regulate is one way to reduce the opportunity to lose excessive amounts of money.[78]

Several matters PIAC raised in relation to the Commission's Draft Report may affect the application of the Bills if the draft recommendations are adopted. They include the following:

- The Poker Machine (Reduced Losses-Interim Measures) Bill 2009 (Cth) provides for courts to have regard to 'any loss or damage suffered as a result of the contravention' (section 10(2)(b). In order to determine losses, player statements as recommended in Chapter 6, providing they include winnings as well as losses, would be required to determine financial loss.

- Chapter 12 of the Draft Report discusses liberalising online gambling and recommends repeal of the *Interactive Gambling Act 2001* (Cth).[79] PIAC submits that all computer terminals have the potential to become gaming machines if the Act were to be repealed, in which case consideration should be given to all new and current harm-minimisation legislation being drafted to apply to online gambling.

---

73 Ibid 15.1-15.26.
74 Ibid 15.18.
75 Ibid 16.2.
76 Ibid 8.24.
77 Parliament of Australia, Senate, Community Affairs Legislation Committee, *Poker Machine (Reduced Losses-Interim Measures) Bill 2009 and Protecting Problem Gamblers Bill 2009,* <http://www.aph.gov.au/SENATE/COMMITTEE/CLAC_CTTE/poker_machine_protect_problem_gamblers_09/tor.pdf>, at 14 December 2009.
78 Bailey, above n 2, 8.
79 Productivity Commission, above n 1, Recommendation 12.1.

16. Conclusion

PIAC is concerned that the Draft Report does not give special consideration to special needs groups: Aboriginal communities, young people, people with co-morbidities, people with intellectual or psychiatric disability and low-income groups. This is the major deficiency with the report. However, if the recommendations are adopted, they will go a long way to improving protection for everyone in the community.

In this submission, PIAC also emphasises the need for administrative and legislative reform. Governance arrangements in states and territories must change to separate regulatory from enforcement functions, gambling authorities must have the public interest and consumer protection as their main objectives, and decisions about research must be independent from government and industry. Legislation is required to ensure that consumers have a right to redress when providers fail to apply harm-minimisation practices.

The range of harm-minimisation measures recommended by the Commission is impressive. Together with the restrictions on cash and credit, pre-commitment strategies and changes to machine design should assist problem gamblers. Other reforms relating to information, self-exclusion schemes and advertising promote an environment of responsible gambling. PIAC's main concern with these recommendations is the concentration on electronic gaming machines, rather than the application across all types of gambling.

PIAC refers to recent research linking access to electronic gaming machines and problem gambling and recommends that the Commission review the section on access to gaming in light of this research. Related to this are PIAC's concerns about the promotion of online gaming if Australia should lift prohibitions. Increasing access and promotion of new forms of gambling could have serious consequences. Protective legislation should be part of any new Act that allows new forms of gambling in Australia.

PIAC also strongly supports the proposal in the Draft Report of the creation of a proposed statutory cause of action and has outlined in some detail, proposals as to how this proposed statutory cause of action could be drafted. PIAC is of the view that, at present, the common law in Australia does not adequately protect vulnerable consumers from excessive gambling and it is unlikely that this position will change in the near future. The adoption of a proposed cause of action would provide all parties with greater certainty about those limited cases in which a gambling-service provider owes a consumer a duty of care and has to compensate the consumer if it breaches that duty of care by acting egregiously towards the consumer.

Finally, as a priority, all Australian governments should support consumer consultation by funding a specialist entity, independent of industry, government and gambling treatment services to provide input and advise on the implementation of the reforms recommended by the Productivity Commission.

17. Recommendations

PIAC recommends that government adopt a statutory cause of action that allows the following provisions:

1. *An individual has a cause of action against a gambling provider if:*
   - *(a) the gambling provider having reasonable knowledge of the vulnerability of the individual;*
   - *(b) the provider intentionally, recklessly, carelessly or negligently acts or fails to act in a way that is is egregious.*
2. *'Egregious' acts or omissions include the following:*
   - *(i) permitting a highly intoxicated person to gamble in a venue;*
   - *(ii) cashing cheques for a patron, or extending credit facilities to a patron if the patron and/or someone on his or her behalf has specifically requested that the provider not provide credit or cash cheques;*
   - *(iii) failing to advise a patron that in light of his/her vulnerability that he or she should resign membership from the club, hotel or other provider;*
   - *(iv) offering inducements including the provision of cheque-cashing facilities or Automatic Teller Machines that allow patrons to make withdrawals from credit accounts, supplying complimentary products such as free food or alcohol, transport or accommodation, complimentary tickets to sporting or other events;*
   - *(v) failing to implement adequate systems to enable the detection of gamblers who are subject to exclusion orders or bans on entry into a gambling venue; and*
   - *(vi) failing to implement adequate systems or provide staff with adequate training about removing excluded persons who have entered a gambling venue or are using gambling services.*
3. *If a court/tribunal finds that a gambling service is liable under the proposed cause of action, it may do any or all of the following:*
   - *(a) order the gambling-service provider to pay the individual damages, including general, special, aggravated and exemplary damages, by way of compensation for any loss or damage suffered by reason of the provider's egregious conduct,*
   - *(b) order the provider to develop and implement a program or policy aimed at eliminating future egregious conduct.'*
4. *The jurisdiction to hear proceedings under the proposed cause of action should be vested in an appropriate tribunal, with the right to appeal to a higher court on questions of law.*

Appendix A

Energy + Water Consumer Advocacy Program (EWCAP)

EWCAP represents the interests of residential consumers of electricity, gas and water services. The program aims to:

- improve the affordability of electricity, gas and water for residential consumers, particularly low-income and other vulnerable consumers;
- ensure access to electricity, gas and water for low-income and other vulnerable consumers;
- ensure that sustainability policies and programs reflect the needs of low income and other residential consumers;
- ensure that the regulation and reform of the NSW and national electricity and water markets recognise the needs of low-income and other households; and
- increase community participation in energy and water market reform and related issues.

In fulfilling these responsibilities, EWCAP functions as a peak voice for consumer organisations and the community in NSW in debates and decision-making processes around the provision and regulation of energy and water services. EWCAP has represented the views of NSW residential consumers and developed policy on their behalf in relation to the operation and reform of these essential service industries. It has also worked to enable consumers and their representative organisations to become more conversant with the many complex and highly technical issues inherent in these industries.

Funding

Industry and Investment NSW funds EWCAP, with a new application for funding required every two years.

What does EWCAP do?

EWCAP's work consists primarily of making submissions to public enquiries; contributing a consumer perspective to government committees; liaising with other consumer, community and environmental groups; conducting research; and publicising relevant issues in the media.

Staffing

EWCAP is currently staffed by a full-time Senior Policy Officer a full-time Policy Officer and a part-time Research & Policy Officer. It also draws on the broader policy, legal and training expertise of PIAC and has a Reference Group that provides direct links with key constituencies.

Reference Group

The Reference Group provides a direct link between EWCAP staff and the community-sector groups working with key constituencies like rural consumers, public housing residents, Indigenous consumers, people with disability, culturally diverse consumers.

The Reference Group assists EWCAP directly by giving advice and feedback on systemic issues related to energy and water faced by residential consumers; policy direction in relation to the gas, electricity and water industries in NSW and nationally; and feedback from relevant meetings, committees, processes in which Reference Group members participate.

Current members of the Reference Group include:

- Council of Social Service NSW;

- Combined Pensioners and Superannuants Association of NSW;
- Park and Village Service;
- Ethnic Communities Council;
- Indigenous consumer representative;
- Institute for Sustainable Futures (University of Technology Sydney);
- rural consumer representative; and
- Western Sydney Community Forum.

Workplan

EWCAP has a formal workplan, agreed between PIAC and Industry & Investment NSW, that sets out the key result areas, objectives, strategies and performance measures.

Value

Without EWCAP, there would have been little input from residential consumers into the reform of the energy and water industries in NSW over the past ten years. The further reforms planned for these industries in 2009-11 are no less significant in their implications for NSW households, in particular for people on low and fixed incomes. Critically, neither PIAC nor any other community group could provide the level and quality of work achieved by EWCAP without the continued funding support of the NSW Government.

Relationships

The NSW Government, energy and water businesses and regulators all have accepted the importance of taking account of the concerns and needs of residential consumers. EWCAP maintains constructive relationships with Industry & Investment NSW, energy and water businesses and the Independent Pricing and Regulatory Tribunal (IPART), which have consulted regularly with EWCAP on an extensive and varied range of issues in relation to:

- economic regulation;
- tariff reform;
- licence obligations;
- energy market competition;
- demand management; and
- consumer protection arrangements.